**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN**

**THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929**

**WP(C).No. 11114 of 2004(W)**

**PETITIONER:**

**K.K.LAITHA W/O. M.M.HARI, AGED 52 YEARS,**
**SANSKRIT TEACHER, ST.MARY'S U.P.SCHOOL, NJARAKKAL,**
**ERNAKULAM DISTRICT.**

**BY ADV. SRI.V.A.MUHAMMED**
**SRI.K.E.HAMZA**

**RESPONDENTS:**

1. **THE STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, GENERAL EDUCATION DEPARTMENT, SECRETARIAT, TRIVANDRUM.**
2. **THE DIRECTOR OF PUBLIC INSTRUCTION, JAGATHY, TRIVANDRUM-14**
3. **THE DISTRICT EDUCATIONAL OFFICER, ERNAKULAM.**
4. **THE ASSISTANT EDUCATIONAL OFFICER, VYPEEN, ERNAKULAM DISTRICT.**
5. **THE MANAGER, ST.MARYT'S U.P.SCHOOL, NJARAKKAL.**
6. **SMT. K.A.MARY, HEADMISTRESS (NOT APPROVED) ST.MARY'S U.P.SCHOOL, NJARAKKAL.**

**BY ADV. SRI.V.M.KURIAN**
**SRI.A.V.THOMAS**
**SRI.MATHEW B. KURIAN**
**SRI.K.T.THOMAS**
**BY GOVERNMENT PLEADER SMT. SUDHA**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/09/2007 ALONG WITH WPC NO. 26374 OF 2004, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

*KSS*

**WPC.NO.11114/2004 W**

**APPENDIX**

**PETITIONER'S EXHIBITS:**

**EXT.P1:** **COPY OF THE ORDER NO.B/2694/2001/K.DIS. OF THE 3RD RESPONDENT DTD. 22/11/2001.**

**EXT.P2:** **COPY OF THE ORDER NO.K.DIS.B4/19445/2001 OF THE 2ND RESPONDENT DTD. 22/10./2002.**

**EXT.P3:** **COPY OF THE ORDER NO.K.DIS./30910/03/F3/DPI OF THE 2ND RESPONDENT DTD. 23/02/2004.**

**5TH RESPONDENT'S EXHIBITS:**

**EXT.R5(A):** **COPY OF THE ORDER NO.K.DIS.G4-23491/71 OF THE REGIONAL DEPUTY DIRECTOR OF PUBLIC INSTRUCTION, ERNAKULAM.**

**EXT.R5(B):** **COPY OF THE APPOINTMENT ORDER DTD. 17/04/1984 WITH PROCEEDINGS OF THE ASSISTANT EDUCATIONAL OFFICER, VYPEEN DTD. 26/04/1984 APPROVING THE APPOINTMENT.**

**EXT.R5(C):** **COPY OF THE STAFF FIXATION ORDER DTD. 14/07/1998 ISSUED BY THE 4TH RESPONDENT FOR THE YEAR 1998-99.**

**EXT.R5(D):** **COPY OF THE STAFF FIXATION ORDER DTD. 15/07/1999 ISSUED BY THE 4TH RESPONDENT FOR THE YEAR 1999-2000.**

**EXT.R5(E):** **COPY OF THE STAFF FIXATION ORDER DTD. 10/07/2001 ISSUED BY THE 4TH RESPONDENT FOR THE YEAR 2001-2002.**

**EXT.R5(F):** **COPY OF THE STAFF FIXATION ORDER DTD. 15/07/2002 ISSUED BY THE 4TH RESPONDENT FOR THE YEAR 2002-2003**

**/TRUE COPY/**

**P.A.TO JUDGE**

*KSS*

**THOTTATHIL B.RADHAKRISHNAN, J.**

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W.P(C).Nos.11114 & 26374 OF 2004

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Dated this the 20th day of September, 2007

**JUDGMENT**

**"C.R."**

St.Mary's U.P. School, Njarakkal is an institution under the St.Mary's Educational Agency, a corporate educational agency. Smt.K.A.Mary was promoted as the Headmistress of that school. The statutory authorities, including the Government, have concurrently refused approval for such promotion, upholding the contention of Smt.K.K.Lalitha, that she was entitled to be appointed in preference to Smt.K.A.Mary, in terms of Rule 45 in Chapter XIV A of the Kerala Education Rules, 1958, hereinafter referred to as the 'KER', for short, framed and issued by the Government of Kerala, in terms of authority conferred by Section 36 of the Kerala Education Act, 1959, hereinafter referred to as 'the Act'. W.P(C).26374/04 is filed by the management challenging that decision, while W.P(C).11114/04 is filed by Smt.Lalitha, seeking a direction to the Manger to appoint her as the Headmistress with effect from 1.6.2001, the date of occurrence of that vacancy, with all attendant benefits,

contending that the Manager is not complying with the successive orders of the statutory authorities.

2. Smt.Lalitha is a graduate teacher, while Smt.Mary is an under-graduate teacher.

3. As of now, the competing teachers have retired on superannuation.

4. In terms of Rule 45 of Chapter XIV A KER, if there is a graduate teacher with B.Ed or other equivalent qualification, and who has got at least five years experience in teaching after acquisition of B.Ed degree, he may be appointed as Headmaster, provided he has got a service equal to half of the period of service of the senior most under-graduate teacher. Rule 45 provides a statutory preference to the graduate teacher over the under-graduate teacher for appointment as Headmistress of the U.P. School. This issue, including the constitutional validity of that rule, is no more res integra in view of the decision of this

Court in **Kunjappan** v. **State of Kerala** [1992 (2) KLT 87], affirmed by the Division Bench in S**adanandan** v. S**tate of Kerala** [2000 (3) KLT 516].

5. The staff fixation orders in relation to this school, which are produced as Exts.R5(c) to R5(f) along with the counter affidavit of the Manager in W.P(C).11114/04, would show that Smt.Lalitha was a junior Sanskrit teacher, who had been enjoying the benefit of G.O.(MS) No.62/73/G.Edn. dated 2.5.1973. Among them, Ext.R5(e) is the staff fixation order for the academic year, in which, the vacancy of the Headmistress arose. The reason shown in that staff fixation order for the retention of Smt.Lalitha is as follows:

> "F.T. Benefit is given to Sanskrit Teacher Smt.K.K.Lalitha having 8 periods and 5 years service vide (MS) No.62/73/G.Edn. dt.2.5.73."

According to Smt.Lalitha, her continuance in the school on such ground enables her to claim entitlement to be appointed as the

Headmistress in preference to Smt.Mary, who is only an under-graduate teacher.

6. The contentions of the management in support of its decision to appoint Smt.Mary, an under-graduate teacher in preference to Smt.Lalitha are that the latter one is incompetent to be appointed as Headmistress in terms of Rule 45 of Chapter XIV A, because, she is only continuing under the protection in terms of the aforesaid Government Order G.O.(MS) No.62/73 and that the management, being a minority institution, is entitled to appoint a Headmaster of its choice on the strength of Article 30 (1) of the Constitution of India.

7. Learned counsel for Smt.Lalitha, supporting the decisions of the statutory authorities, including that of the Government, argued that on the strength of G.O.(MS) No.62/73, particularly clause (vi) thereof, as interpreted by the Division Bench of this Court in **Sreeramachandran** v. **State of Kerala** [2002 (2) KLT 428], the protection granted is to the post and not to the teacher

and therefore, the post that is thereby protected is part of the total number of posts available in the school and hence, Smt.Lalitha is entitled to be considered in preference to Smt.Mary in view of Rule 45 in Chapter XIV A of KER, which mandates that a graduate teacher has to be preferred to an under-graduate for being appointed as Headmaster in a U.P. School.

8. It was also argued on behalf of Smt.Lalitha that the statutory authorities have repelled the claim of the management that it is a minority institution and the Government have not deviated from such view of the subordinate statutory authorities, though the ultimate decision of the Government rested on the finding that the third respondent was to be preferred to the 4th respondent in terms of Rule 45 of Chapter XIV A.

9. As regards the question whether the petitioner is a minority institution, Ext.P2 shows that the statutory authorities had, even way back in 1984, approved an appointment made by the

management in exercise of its rights on the basis of the protection in terms of Article 30 (1) of the Constitution of India. The only reason stated in the impugned orders is that no formal orders have been issued by the competent authority, including the Government, declaring the status of the petitioner as a minority institution. While this Court in **Haji Abdul Salam** v. **State of Kerala** [2004(3) KLT 826 (DB)] has laid down that it is for the Government to decide on any dispute as to the minority status of any institution, it is the settled proposition of law that the minority status does not depend upon any declaration and when the Government or the other competent authority makes a declaration to that effect, it only declares and recognises the existing fact, to the effect that the institution in question is a minority institution. Profitable reference in support of this could be made to the decision of the Apex Court in **N.Ammad** v. **Manager, Emjay High School and Others** (AIR 1999 SC 50). In the impugned Ext.P9 revisional order of the Government, it has been categorically stated that the right to appoint a Headmaster in a minority school is one of the protected rights

referable to Article 30 (1) of the Constitution. The Government do not give its seal of approval to the decision of the statutory authorities that the institution has not obtained formal orders of recognition as a minority institution. The undisputed fact that even way back in 1984, approval was granted by the competent authority for the appointment made by the institution, invoking, and on the strength of, the protection of Rule 30 (1) of the Constitution categorically shows that the institution in question is one which has been recognised by the Government and the competent authorities as a minority institution in terms of Article 30 (1) of the Constitution of India, for all purposes.

10. After laying down in Rule 6 (1) of that Chapter, among other things, that if the number of periods per week for Sanskrit language is below 15, there could be one part-time post, Rule 12 in Chapter XXIII KER obliges staff fixation. The statutory staff fixation order that could be issued under Rule 12 has to be in consonance with the other provisions of the KER and the Act. During the relevant time, the distribution of periods in terms of

the curriculum policy framework then in existence was, among other things, that there has to be four periods for Sanskrit per week in each class/division. The staff fixation order of the school in question shows that during the relevant and immediate previous years, Sanskrit was taught in three standards with one division each. This means that, applying Rule 6 (1) of Chapter XXIII, the number of periods per week being 12, that is below 15, there could be only one part-time post. In terms of Rule 55 of Chapter XIV A KER, the number of permanent teachers under each category in the staff list of any school or any of the schools under an educational agency, shall not exceed the aggregate number of sanctioned posts under that category. The necessary consequence of an excess hand would be retrenchment. But, while that rule may not come into play in the case of Smt.Lalitha, she could have continued only as a part-time teacher in view of Rule 6 (1) of Chapter XXIII.

11. Rule 34 of Chapter XIV A requires that every management shall prepare and maintain a staff list called the seniority list of

teachers. Rule 45 provides that the appointment to the post of Headmaster shall be from among the qualified teachers on the staff of the school or schools under the educational agency. The Note to Rule 45 further clarifies the situation that to be a teacher for the purpose of Rule 45, one has to be in the seniority list of teachers. This necessarily means that only a full time teacher, who would be holding a post in terms of the staff fixation order, would be entitled to be promoted as a Headmaster in terms of Rule 45 of Chapter XIV A KER.

12. With the aforesaid in mind, it can be seen that the Act and the statutory rules, namely, the KER, provide the pupil teacher ratio to be maintained and the yardsticks for determining the total number of posts that are to be sanctioned for a school during the academic year. It does not give the executive Government or the statutory authorities any further power to deviate, in any manner, from the statutory rules regarding such staff fixation. Any such deviation is impermissible. See the

decision of the Apex Court in **State of Kerala** v. **K.Prasad** [Civil Appeal No.2913 of 2007, decided on 09.07.2007]

13. With the passage of time, various situations having humanitarian content would have cropped up for consideration of the executive Government. G.O.(MS) No.62/73 was triggered by discussions that followed demands made by certain associations of teachers. Accordingly, certain modifications regarding staff fixation procedure etc, were made as per that Government order. Clause (vi) of G.O.(MS) No.62/73/G.Edn. reads as follows:

"(vi) Conversion of part-time language teachers into full-time

> The formula for creating full-time posts in the independent high schools and U.P. Schools attached to high schools will be extended to independent U.P. Schools and L.P. Schools and U.P. Schools with attached L.P. Schools. Besides this, part-time language teachers who have put in more than 5 years and have 8 periods of work shall henceforth be made full-time. The utilisation of the services of these teachers for teaching regular classes and other subjects and giving them adequate work will be examined by the Director of Public Instruction. This will be with effect from the academic year 1973-74."

14. The first sentence of the afore-quoted provision deals with the application for a particular formula to certain categories of schools to which such formula was not applied earlier. The Government also decided that part-time teachers who have put in more than 5 years of service and have 8 periods of work shall thenceforth be made full-time. The DPI was to examine the utilisation of the services of those teachers who were the beneficiaries of that government order, for teaching regular classes and other subjects and giving them adequate work. This provision was to be effective from the academic year 1973-74. No statutory amendments were brought to KER, to Rule 6 (1) of Chapter XXIII, in particular, for the afore-quoted provision to have any overriding effect on the statutory force of Rule 6(1) of Chapter XXIII. This means that any benefit that a part-time teacher may get by virtue of the second sentence of clause (vi) of G.O.(MS)62/73 could only inure to that person and not to the part-time post that is held by that teacher. It would have been essentially the executive wisdom to provide aid and support to a

part-time teacher who would be continuing for a long period in service while drawing only emoluments of a part-time teacher. While G.O.(MS)62/73 would enable such a teacher to continue to work and draw emoluments etc., in terms thereof, no right would legally accrue in favour of such incumbent to defeat any statutory right that may be available with any other teacher.

15. In view of the aforesaid, the quality of the post held by Smt.Lalitha could only be that of a part-time teacher in terms of the staff fixation order and she could be permitted to continue to be treated as a full-time hand in terms of G.O.(MS)62/73. This is exactly what is stated in Ext.R5(e) in W.P(C).11114/04. As already noticed, the staff fixation orders do not concede that the post of the junior Sanskrit teacher in the U.P. School of the petitioner is a protected post. In law, that could not be. There is no estoppal against the statute. The statutory authorities, including the Government, could not have extended to Smt.Lalitha anything in excess of her statutory entitlements, at any rate, against the interest of Smt.Mary.

16. The view in the preceding paragraph requires advertence to the Bench decision of this Court in **Sreeramachandran** (supra). A clear understanding of the facts that led to that judgment would show that in the staff fixation orders which were considered in that case, in the column for name of posts, after the word 'Hindi', it was stated “protected”, within brackets. The Bench was, therefore, of the view that such an entry only means that the post Hindi teacher is protected in terms of G.O.(MS) 62/73. That view was also fortified by the statements in column 11 of the staff fixation order dealt with in that case, as is discernible from para 4 of that judgment. In that case, it was stated “one protected post of F.T. Hindi teacher is sanctioned to give full time benefit to Sri.Subramanya, Hindi teacher in terms of G.O.(MS)62/73/G.Edn. dated 2.7.73”. It was in that context that clause (vi) of G.O.(MS)62/73 was read. It was rightly noticed by the Bench that the said G.O. does not make any reference to any protection being given to the teacher and what is provided is for conversion of an existing part-time post to a

full-time post, subject to certain conditions. The addition of the word 'protection' by the AEO to the staff fixation order in that case was deprecated, particularly when the Governmental view favours the teacher. On the facts and the circumstances of that case, it can be easily noticed that the decision in **Sreeramachandran** (supra) rests exclusively on the facts of that case and I am unable to find way to apply that as a precedent on a question of law relating to the interpretation and application of the terms of G.O.(MS)62/73, which is only an executive order and which cannot run contrary to, or, in any manner, reduce the rigour of Rule 6 (1) in Chapter XXIII KER.

17. Smt.Lalitha, who continued as a full-time teacher on the strength of clause (vi) of G.O.(MS)62/73 had not figured against any of the posts sanctioned as per the staff fixation orders, including for the relevant year. Therefore, even if she possesses the educational qualifications required for a graduate teacher, she was not a teacher who could have been treated as a member of the staff of the school, to be within the zone of consideration

for appointment as Headmistress. Therefore, even if a graduate teacher is to be preferred to an under-graduate teacher in terms of Rule 45, Smt.Lalitha was not entitled to get preference over Smt.Mary in terms of that rule. Not only preference, she was not entitled to be treated as a "member of the staff" of the school or the educational agency to be considered for appointment as Headmistress.

18. Placed in the aforesaid circumstances, the learned counsel for Smt.Lalitha argued that Section 35 of the Act provides the Government with the power to make any order for removal of difficulties and that G.O.(MS).62/73 is to be treated as one following in that regard. The provision in Section 35 of the Act is that if any difficulty arises in giving effect to the provisions of the Act, the Government may, by order, do anything not inconsistent with such provisions which appear to them to be necessary or expedient for the purpose of removing the difficulty. That provision is not one that delegates the legislative power. It is a power to do such things as may be necessary for

the purpose of removing the difficulty in giving effect to any particular provision in the Act. In doing so, the Government are statutorily obliged to ensure that they do nothing inconsistent with the provisions in relation to which they see a difficulty, while being given effect to. Therefore, a power to remove difficulty in the nature that is provided in by Section 35 of the Act is not a power to make a provision derogative or contrary to the provisions of the Act or the KER. If provisions in clause (vi) of G.O.(MS).62/73 is to be read to apply in a manner that it enables conversion of a part-time post to a full-time post, in cases where a teacher who has 8 periods of work has put in 5 years of service, it would immediately impinge and run contrary to the conditions in Rule 6 (1) of Chapter XXIII KER, which provides that there can be only one part-time post where the number of periods per week is below 15 for a language teacher in Sanskrit. This is clearly impermissible. Not only that, the eligibility for the benefit of the second sentence in clause (vi) of G.O.(MS)62/73 is dependent on two conditions. It favours only a teacher who has more than 5 years of service and who has 8

periods of work. This means that the application of that provision can only be on the basis of the individual and not on the basis of the post.

19. The executive order G.O.(MS).62/73 could find a constitutional support only under Article 166 (1), while the Act is a piece of legislation and KER is a piece of authorised subordinate legislation and the executive order G.O.(MS).62/73 cannot have an overriding effect or, in any manner, deplete the flow of the provisions of the Act and KER.

20. For the aforesaid reasons, the claim of Smt.Lalitha that she was entitled to be appointed as the Headmistress of the school is not sustainable. Neither she nor the Government has a case that Smt.Mary is incompetent to be appointed as Headmistress. She is an under-graduate teacher and she was holding a sanctioned post during the academic year in question. The only finding of the Government against her appointment was the preference that the Government found as available to

Smt.Lalitha. That view being unsustainable, the statutory authorities are bound to approve the appointment of Smt.Mary, as made by the Manager.

In the result,

(i) W.P(C).26374/04 is allowed quashing the decisions impugned therein and by further directing that the competent educational officer will issue orders approving the appointment of Smt.Mary, made by the management, as Headmistress of the St.Mary's U.P.School, Njarakkal with effect from the date on which such appointment was made. Smt.K.A.Mary will also be entitled to all benefits consequent on such approval on the strength of this judgment. All monetary benefits on that account shall be released and her retiral benefits re-fixed accordingly, within three months of the date of receipt of a copy of this judgment.

(ii) W.P(C).11114/04 is dismissed.

(iii) The parties will bear their respective costs.

Sd/-

**THOTTATHIL B.RADHAKRISHNAN,**
**Judge**

kkb.